

August 1991

MERIT SYSTEMS PROTECTION BOARD

Time-And-Attendance and Personnel Practices Need Attention



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General Government Division

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August 8, 1991

The Honorable John Glenn
Chairman, Committee on Governmental
Affairs
United States Senate

The Honorable Dennis DeConcini
Chairman, Subcommittee on Treasury, Postal
Service and General Government
Committee on Appropriations
United States Senate

This report responds to your requests that we review allegations received by your offices regarding certain practices of senior officials of the U.S. Merit Systems Protection Board (MSPB). As agreed, we focused our review on allegations regarding

- the time-and-attendance (T&A) practices of the three MSPB Board members and their personal staffs,
- MSPB's detailing of certain Schedule C appointees and the pay level MSPB set for a Schedule C appointee during a limited emergency Senior Executive Service (SES) appointment,¹ and
- the role and organizational independence of the MSPB Inspector General (IG) in reviewing MSPB's activities.

Although an evaluation of MSPB's Equal Employment Opportunity (EEO) program was not an objective of this review, we did some limited work in this area after past and present MSPB personnel we interviewed voiced perceptions of a racially and/or sexually discriminatory working environment at MSPB.

**MSPB's Mission and
Structure**

MSPB is an independent, quasi-judicial executive agency created by the Civil Service Reform Act of 1978. MSPB's mission is to ensure that (1) federal employees are protected against abuses by their agency's management, (2) executive agencies make employment decisions in accordance with merit system principles, and (3) federal merit systems are

¹Schedule C appointees are individuals who receive noncompetitive appointments at the General Schedule (GS) 15 level or below to positions that are policy-determining or involve a close and confidential working relationship with the head of an agency or other key appointed official of the agency. See 5 C.F.R. 213.3301.

kept free of prohibited personnel practices.² According to an MSPB official, as of September 30, 1990, MSPB had a total of 310 employees in its headquarters and 11 regional offices.

The 1978 act provides for the appointment by the president, with the advice and consent of the Senate, of three Board members to nonrenewable 7-year terms. These officials are (1) the Chairman, who serves as the chief executive and administrative officer of the Board; (2) the Vice Chairman, who assumes the duties and responsibilities of the Chairman during the Chairman's absence or disability or when the office of Chairman is vacant; and (3) the Member. MSPB's Executive Director, a career senior executive, is responsible for managing most of the operations and programs of the agency's headquarters offices and 11 regional offices.

In September 1989, when we received your first request that we review allegations of excessive absenteeism by Board members and their staffs, the three Board members were Chairman Daniel R. Levinson, who was appointed in August 1986; Vice Chairman Maria L. Johnson, who was appointed in May 1983; and Member Samuel W. Bogley, who was appointed in November 1988. Ms. Johnson and Mr. Bogley left the agency in November 1990 and November 1989, respectively, Ms. Johnson after completing her 7-year term and Mr. Bogley after completing a 1-year recess appointment. None of the allegations implicated current Vice Chairman Antonio C. Amador or current Member Jessica L. Parks, both of whom were appointed to their MSPB Board positions in 1990.

Each Board member has a staff of attorneys and support personnel assigned to his or her immediate office. In September 1989, Chairman Levinson had two attorneys and two nonattorney support personnel on his staff. Vice Chairman Johnson had three attorneys and four nonattorney support personnel working for her, of whom two were detailees from other MSPB offices and one was a student aide. Member Bogley's staff consisted of one attorney and a nonattorney detailee from the Federal Labor Relations Authority (FLRA).

Results in Brief

As presidential appointees, Board members are compensated on the basis of their status as officers and are not required to work specific

²Merit system principles and prohibited personnel practices were defined in the Civil Service Reform Act and currently appear in 5 U.S.C. ch. 23.

duty schedules or specific hours. Accordingly, these members can legally maintain whatever work schedules and office hours they deem appropriate to do their work.

All other MSPB employees must comply with the agency's established T&A procedures and requirements. After reviewing T&A practices in the three Board members' and Executive Director's offices in 1989, we found extensive breakdowns in internal controls in the T&A reporting and record-keeping practices. These breakdowns resulted from the frequent failure of employees, timekeepers, and supervisors in the four offices to meet their obligations to properly prepare and process T&A reports. MSPB's Chairman said he has taken steps to better ensure that all personnel in these offices comply with MSPB's T&A requirements.

MSPB also improperly detailed three Schedule C appointees from the Vice Chairman's office in November 1990. These appointees had been employed to work in a close and confidential relationship with a key MSPB appointed official (the former Vice Chairman), a condition required by Office of Personnel Management (OPM) regulations for Schedule C appointments. When the key official later left MSPB, the requisite close and confidential working relationship between these appointees and the key official ended. However, these appointees continued in MSPB employment under their same Schedule C appointments. Continuing these three appointees' employment in these circumstances was improper because the basis for their appointments no longer existed. MSPB should ensure that the employment of its Schedule C appointees is consistent with OPM regulations.

MSPB violated its own published pay-setting policy on three separate occasions when it made initial appointments to the SES at a pay level higher than the agency's pay-setting policy authorized. MSPB should retroactively correct the pay-setting errors and recover the overpayments through appropriate collection action or request that GAO waive the overpayments.

In addition, MSPB improperly had its IG reporting to the Executive Director rather than directly to the Chairman, a practice that violated the GAO standard and Office of Management and Budget (OMB) requirement for organizational independence. In January 1991, MSPB's Chairman corrected this situation by having the IG report directly to him.

Finally, there is evidence that a number of past and present MSPB employees perceived MSPB as having a racially and/or sexually discriminatory working environment. MSPB's planned internal management review should be completed to determine the extent and validity of these perceptions and to identify corrective measures appropriate to the problems found.

Objectives, Scope, and Methodology

The objective of our review was to determine the validity of specific allegations made against senior MSPB officials and their staffs concerning (1) T&A practices in the offices of the Board members, (2) MSPB's detailing of its Schedule C personnel and the pay level MSPB set for a Schedule C appointee during a limited emergency SES appointment, and (3) the role and organizational independence of MSPB's IG. Because our work was generally limited to reviewing these allegations, we did not determine how well MSPB was carrying out its overall mission of protecting the federal merit system.

In reviewing the allegations, we interviewed five past and present MSPB Board members. Chairman Levinson, former Vice Chairman Johnson, and former Member Bogley were interviewed because they were Board members during part or all of the period covered by the allegations. Current Vice Chairman Amador and current Member Parks were interviewed to obtain information on the expectations governing their work schedules as Board members and other matters. We also interviewed MSPB's Executive Director and 25 other past and present MSPB staff who had worked at MSPB at some point during the years 1986 through 1990.³ Agency staff were selected for interviews on the basis of our assessment of whether these individuals could reasonably be expected to have material, first-hand knowledge of one or more of the specific issues we were examining.

To establish the applicable T&A requirements, we reviewed federal law, regulations, prior decisions of the Comptroller General of the United States, and published MSPB policies and procedures. We also obtained information from the White House's Office of Presidential Personnel concerning whether that office had established policies, procedures, or expectations governing presidential appointees' time and attendance.

We identified a total of 10 employees from MSPB's personnel records and our interviews who were permanently assigned to a Board member's

³As of February 1, 1991, 8 of the 31 MSPB interviewees had left the agency.

office at some point during fiscal year 1989. To test the adequacy of T&A internal controls in the Board members' offices, we reviewed the biweekly T&A records of all 10 of these employees. We also reviewed the T&A records of the FLRA detailee assigned to Member Bogley's office. In addition, we reviewed T&A records for each such employee for the first pay period of each calendar month in fiscal year 1989 to determine whether MSPB's established internal control procedures governing time and attendance were followed. We included the four employees in the Executive Director's immediate office in our T&A internal controls review when work done early in the review showed that correct T&A procedures were not being followed in that office.

In assessing the validity of the allegations concerning MSPB's Schedule C detailing and promotion actions, we interviewed policy and legal officials in OPM. On the issue of the reporting line between MSPB's IG and its Chairman, we interviewed policy officials in OMB. We sought the views of OPM and OMB officials because these officials have governmentwide program responsibilities and expertise in the specific subject areas where the allegations had been raised or the internal control problems identified. We also reviewed personnel and payroll records and published MSPB policies relating to the personnel actions we were examining.

An evaluation of MSPB's EEO program was not within the scope of our review. However, during our interviews, some past and present MSPB employees voiced concerns to us regarding racial and/or sexual discrimination at MSPB. After noting these concerns, we obtained descriptive data from MSPB's EEO Director on the number and types of precomplaint counseling activities and formal discrimination complaints at MSPB during calendar years 1987, 1988, 1989, and 1990. These years were chosen because we concluded that an examination of the most recent 4-year period for which data were available would provide an indication of the EEO concerns of current and former employees.

Because some of these discrimination complaints were pending as of December 31, 1990, or had been settled without final adjudicative findings, we did not analyze the data by case outcome. We also did not independently verify the data provided by MSPB's EEO Director.

We did our review at MSPB's Washington, D.C., headquarters offices between November 1989 and February 1991. Our review was done in accordance with generally accepted government auditing standards. MSPB and former Vice Chairman Johnson provided written comments on

a draft of this report. These comments are presented and evaluated in appendixes I and II.

T&A Internal Control Breakdowns Occurred in the Board Members' and Executive Director's Offices

MSPB Board members are not required to establish and conform to specific work schedules. Accordingly, these members can legally maintain whatever work schedules and office hours they deem appropriate to do their work. All other MSPB personnel (except certain part-time employees) are required to work under established duty schedules. All MSPB personnel except Board members are also required to account for their scheduled duty hours through agency-prescribed T&A reporting and documentation procedures. Certain of these T&A procedures, which serve as an internal control against fraud and abuse, were frequently not followed in the Board members' and Executive Director's offices.

Board Members Do Not Have Specific T&A Obligations

As presidential appointees, MSPB Board members are not subject to provisions of law or regulation mandating that they work a set number of hours or days per week.⁴ In addition, the White House's Office of Presidential Personnel had issued no guidance or instructions governing Board members' time and attendance. In the absence of compulsory duty schedules, Board members were free to set their own duty hours and work schedules, and records were not required to be kept on these appointees' time and attendance. However, Board members were accountable to the Board Chairman, in his capacity as the agency head and chief executive officer, for accomplishing their work.

In the course of examining the T&A allegations, we interviewed each of the three Board members who worked at MSPB in 1989 concerning their own T&A practices. Former Vice Chairman Johnson said she had consistently worked whatever hours and days were necessary to get her work done. Ms. Johnson said that when her caseload was heavy, as it was between 1983 and 1986 when the Board processed a large number of air traffic controller appeals, she worked long days and weekends.

Ms. Johnson said that beginning in 1986, when her caseload subsequently became lighter with the completion of the air traffic controller cases, she reduced her office time to whatever hours were needed to complete her casework. When we interviewed Ms. Johnson in July 1990,

⁴Presidential appointees are exempt from the Annual and Sick Leave Act, 5 U.S.C. 6301 et seq., and are entitled to compensation based solely on their status as officers rather than on numbers of hours worked. See 53 Comp. Gen. 577 (1974) and 61 Comp. Gen. 586 (1982).

she said that to keep her work current she was averaging 30 work hours per week at her office. Ms. Johnson added that she also spent an average of 10 hours per week at home reading work-related materials.

Former Member Bogley said he maintained daily office hours of 9:00 a.m. to 6:00 p.m. when he first became a Board member in November 1988. Mr. Bogley added that he eventually changed his office hours such that he arrived in the afternoon and worked until 9:00 p.m. or 10:00 p.m. in the evening, as he became more familiar with the duties of his position.

Chairman Levinson did not specify what his usual work schedule was but did say that Board members were expected to spend whatever hours were necessary to act on appeal cases before them in a timely manner. Mr. Levinson added that because the Board receives 1,300 to 1,400 cases for processing each year, he felt that a 40-hour workweek would probably be the minimum that a Board member could work and still keep up with his or her work. Mr. Levinson also noted that Board members were encouraged to be available to participate in special agency activities, such as Hispanic Heritage Week, occurring during the regular business day.

Mr. Levinson said that, overall, he considered Ms. Johnson to have acceptably met her work obligations during the more than 4 years they had worked together. Mr. Levinson noted that he was reluctant to make a broad judgment about Mr. Bogley's work because he had only worked with Mr. Bogley for a limited period of time.

Staff in the Board Members' and Executive Director's Offices Often Did Not Follow Established T&A Procedures

According to MSPB's Executive Director, all personnel in the three Board members' and Executive Director's offices (except the Board members themselves) were required to report their time and attendance in accordance with MSPB's established T&A procedures. However, T&A records prepared in fiscal year 1989 by staff in the Board members' and Executive Director's offices showed that MSPB's T&A requirements were frequently not followed by employees, timekeepers, or Board members (as these persons' supervisors) in the four offices.

In accordance with the Federal Managers' Financial Integrity Act of 1982 (FMFIA), 31 U.S.C. 3512(b), GAO has published standards to be followed by executive agencies in establishing and maintaining systems of

internal controls.⁵ A principal purpose of establishing effective internal controls is to safeguard government assets against waste, loss, unauthorized use, or misappropriation. One of the specific internal control standards requires that the key duties and responsibilities involved in authorizing, processing, recording, and reviewing transactions be separated among different individuals.

MSPB's published operating procedures and instructions for preparing T&A reports, contained in its Time and Attendance Manual, prescribe a separation-of-duties procedure among different personnel. As set forth in the manual, T&A report preparation requires the involvement of three different individuals, each of whom is responsible for a different part of the T&A report process. Each employee is required to prepare and submit his or her work record for the biweekly pay period to a timekeeper. The timekeeper is to use the employee's work report, together with such additional materials as signed leave slips documenting approved leave, to complete a T&A report, which the timekeeper is required to initial. After the employee reviews and initials the completed T&A report, the employee's supervisor is required to review and certify the report. The timekeeper then processes the completed and certified T&A record.

T&A records prepared in each of the three Board members' and the Executive Director's offices during fiscal year 1989 show that one or more of the three individual signatures or initials required by MSPB's T&A procedures (those of the employee, the timekeeper, and the employee's supervisor) were frequently either (1) missing from T&A records; (2) signed by individuals other than those who should have signed them; or (3) signed in more than one capacity by the same individual (e.g., the same individual signed both as employee and as timekeeper or supervisor). More specifically, one or more of the deficiencies described above occurred in

- all 41 of the T&A reports sampled for the 5 employees assigned to Chairman Levinson's office at some point during 1989,
- 38 out of 48 T&A reports sampled for the 4 permanent employees assigned to Ms. Johnson's office at some point during 1989,
- 10 out of 12 T&A reports sampled for the 1 permanent employee in Mr. Bogley's office in 1989, and
- 16 out of 36 T&A reports sampled for the 4 employees in the immediate office of MSPB's Executive Director in 1989. Of these 16 deficient T&A reports, all 12 of the Executive Director's T&A reports were deficient

⁵Standards For Internal Controls in the Federal Government (GAO, 1983).

because she signed her own T&A reports in two places as both employee and supervisor.

As discussed below, we found some evidence of possible T&A abuse on the part of an employee on one Board member's staff. Because available testimonial and documentary evidence was often conflicting and could not be reconciled, we could not conclude from the evidence we obtained that this employee or other employees in these four MSPB offices actually abused their time and attendance during fiscal year 1989. However, because the prescribed T&A procedures were often not followed in these offices, internal controls were weakened, thereby creating an unacceptably high risk for T&A abuse to occur and go undetected.

A T&A Internal Control Breakdown Also Occurred During an Interagency Detail to a Board Member's Office

We found evidence that the FLRA employee who was detailed to former Member Bogley's office for a year, from December 1988 to December 1989, may have abused her time and attendance during the period of her detail. While the evidence we obtained was not conclusive, the specific circumstances of the detail presented an exceptionally high potential for T&A abuse because of lax supervision and poor T&A internal controls.

Two MSPB employees who worked in the same office area where the FLRA detailee worked said they observed that the detailee often did not put in a full workday. One interviewee said that "on a lot of days . . . maybe twice a week" the detailee left the office before the end of her scheduled workday. This interviewee added that she believed the detailee always asked Member Bogley for permission before leaving early but did not know whether the detailee signed for leave on those occasions. The second interviewee said she knew the detailee was a full-time employee but observed that the detailee never worked a 40-hour workweek or an 8-hour workday. This interviewee said she routinely observed that the detailee came to work around 9:00 a.m. or 9:30 a.m. and left for the day at 2:00 p.m. or 3:00 p.m.

Former Member Bogley said his working hours generally began in the afternoon, while the FLRA detailee said she worked from 9:30 a.m. or 10:00 a.m. until Mr. Bogley no longer needed her services on a particular day. Because Mr. Bogley's and the detailee's work schedules only partially overlapped, the detailee was routinely left unsupervised for a large part of the regular business day. The detailee acknowledged to us that as a full-time employee she was required to work a regular 8-hour

workday. She added that she always took personal leave on days when she left work early.

The FLRA detailee's T&A records show that over the course of her 1-year MSPB detail she took leave to cover an absence of less than a full (8-hour) workday on a total of six separate occasions: twice in August 1989, once in October 1989, and three times in November 1989. Mr. Bogley said he gave the detailee permission to take "time off" and to leave work early on some days but added that he was not well versed on federal employee leave procedures.

The detailee's T&A records also show that these records were maintained by a timekeeper at FLRA headquarters and were processed under FLRA's T&A procedures. This FLRA timekeeper said she filled out the detailee's T&A records on the basis of information provided over the telephone by the detailee herself, supplemented by such leave slips (SF-71) as the detailee mailed to her. The timekeeper said the detailee did not always provide a leave slip for leave taken. The timekeeper added that after she recorded this information on the detailee's T&A records, the records were then signed by the detailee's regular FLRA supervisor at FLRA headquarters.

The FLRA timekeeper said that while Member Bogley signed the individual leave slips the detailee submitted to FLRA, no MSPB official reviewed the detailee's biweekly T&A records. The timekeeper added that she and the FLRA supervisor presumed that Member Bogley was ensuring that the detailee worked a full-time schedule and that the detailee requested and received approval for leave whenever necessary.

While the detailee's FLRA timekeeper and FLRA supervisor were involved in preparing and processing the detailee's biweekly T&A reports, neither official had first-hand knowledge of her actual time and attendance and accepted her representations and such leave slips as she submitted to FLRA without independent verification. Although the detailee worked in MSPB's offices during the detail, MSPB officials did not ensure that the detailee was accurately reporting to FLRA her time and attendance and accounting for all of her absences with approved personal leave.

The interagency agreement between FLRA and MSPB that authorized this employee's detail did not contain any provisions defining the respective responsibilities of either agency for maintaining the detailee's time and attendance over the course of the detail. Thus, the procedures followed by FLRA and MSPB for monitoring and reporting this detailee's time and

attendance created an exceptionally high risk for T&A abuse because these procedures made the existing T&A internal controls almost completely ineffective.

T&A Internal Control Weaknesses Were Also Found in an Earlier MSPB Audit

MSPB management had previously been alerted through an earlier audit to the existence of T&A internal control problems resulting from the failure of employees in some MSPB offices to follow established T&A procedures. In a December 1987 report documenting the results of a contractor's examination of MSPB's internal controls in its payroll/personnel system, the contractor identified T&A report preparation deficiencies in a sample of agency headquarters and regional offices. The contractor found evidence that T&A records were sometimes not reviewed, verified, or initialed by the timekeeper; the wrong person was signing some employees' T&A records as their supervisor; and some T&A records lacked a supervisor's signature altogether. The contractor recommended that appropriate agency officials ensure that T&A records were properly reviewed and signed.

In a December 1988 notice distributed to all MSPB offices, MSPB's Director of Administration informed agency officials of the results of the contractor's payroll/personnel review. The notice specifically emphasized the need to ensure that MSPB's employees, timekeepers, and supervisors all fulfilled their respective preparation and review responsibilities in completing T&A records.

The contractor did not review T&A practices in any of the Board members' or the Executive Director's offices. MSPB's IG, who directed the contractor's 1987 review, said the MSPB offices that the contractor sampled were those in which the IG believed there were T&A-related problems. The IG said he had not known of any such problems in the offices of the Board members and Executive Director at the time the contractor began the review.

As discussed above, the same causal factors found by the contractor in 1987—the failure of employees, timekeepers, and supervisors to follow established agency T&A preparation procedures—led to the deficiencies we found in the 1989 T&A sample we reviewed in the Board members' and Executive Director's offices. This condition indicates that the Board members and Executive Director failed to act on the Director of Administration's December 1988 advisory to ensure that the problems the contractor had reported did not also exist in their own offices.

T&A Internal Control Breakdowns Constitute Material Weaknesses

Under FMFIA, agencies are required to report material internal control weaknesses that exist in their programs and activities to the president and to Congress by December 31 of each year. FMFIA also requires that an agency's report contain a plan for correcting material weaknesses found. OMB Circular A-123 defines a "material weakness" for FMFIA reporting purposes as a weakness that would significantly weaken safeguards against waste, loss, unauthorized use or misappropriation of funds, property, or other assets.

MSPB's annual FMFIA reports for fiscal years 1986, 1987, 1988, 1989, and 1990 show that MSPB reported no material weaknesses in its systems of internal controls in any of these years. We believe that the nature and frequency of the T&A deficiencies we found in the Board members' and the Executive Director's offices were of such severity as to constitute reportable material weaknesses. Accordingly, MSPB should report these weaknesses in its FMFIA report for fiscal year 1991 and each year thereafter through the year in which the weaknesses are corrected.

MSPB Has Advised GAO of Corrective Actions

We discussed our findings concerning the T&A internal control weaknesses with Chairman Levinson in January 1991. Mr. Levinson later advised us that he had taken steps to correct the weaknesses we had found. Mr. Levinson said that he had asked Board members to review and sign their staff's T&A records. He also said that timekeepers and employees (including the Executive Director) were being instructed to ensure that they conformed to MSPB's established T&A reporting and recordkeeping procedures. We did not, however, sample T&A reports or interview employees in the four offices after meeting with Mr. Levinson to establish whether the actions taken had been effective in correcting the problems we had found.

Improper Personnel Actions Involving Schedule C and SES Appointees

According to an MSPB personnel official, a total of five details, involving three MSPB Schedule C appointees, occurred between January 1, 1987, and March 1, 1991. All of the detailees were Schedule C appointees hired to work for former Vice Chairman Johnson. Information we gathered showed that three of these five Schedule C details were improper. Additionally, during our review of agency personnel actions, we found that three MSPB personnel received initial SES appointments at a higher pay level than that authorized in MSPB's published policy on pay-setting for the SES.

Schedule C Appointees Were Improperly Detailed

Under OPM regulations, Schedule C positions are excepted from the competitive service on the basis that they are either policy-determining or involve a close and confidential working relationship with a key appointed official of the agency.⁶ A key official can be a presidential appointee, another Schedule C appointee, or an SES member who is not occupying a position reserved for career members of the SES.

MSPB's personnel records show that several days after former Vice Chairman Johnson's November 1, 1990, departure from the MSPB, three of her Schedule C appointees were improperly detailed from the Vice Chairman's office to other offices in the agency. Ms. Johnson's Executive Assistant was detailed to the Office of the Administrative Law Judge, her Confidential Advisor was detailed to Chairman Levinson's office, and her Special Assistant was detailed first to the Office of Management Analysis and later to the Office of Appeals Counsel. We believe that the details of these Schedule C appointees were improper because the requisite close and confidential working relationship with Ms. Johnson no longer existed after Ms. Johnson left the agency. Once that working relationship was terminated, the basis for continuing these persons' Schedule C appointments ceased to exist.

We discussed these details with the new MSPB Vice Chairman, Antonio Amador. Mr. Amador said he had informed MSPB's Executive Director of his decision not to retain any of former Vice Chairman Johnson's staff shortly after he was sworn in on November 1, 1990. Nevertheless, instead of separating Ms. Johnson's three Schedule C appointees from the agency, the Executive Director detailed them from Mr. Amador's office to other MSPB offices effective November 4, 1990. Mr. Amador said he expressed concerns about this arrangement to the Executive Director and to Chairman Levinson when he learned about it because he planned to hire his own staff and did not want to retain any of Ms. Johnson's staff.

We also discussed this situation with an OPM staffing policy official who handles Schedule C matters. This official said that with Vice Chairman Johnson's departure, MSPB had to take action on the employment situations of Ms. Johnson's Schedule C appointees. The official noted that courses of action available to the agency, in addition to separating these

⁶5 C.F.R. 213.3301.

appointees, included (1) new Schedule C appointments; (2) new appointments under other excepted service authorities, such as Schedule A;⁷ or (3) competitive service appointments after successful competition for such appointments. The official added that because Vice Chairman Amador had made a decision not to retain Ms. Johnson's Schedule C appointees on his staff, their details from the Vice Chairman's office by the Executive Director were improper.

According to MSPB's personnel records, two of Ms. Johnson's Schedule C appointees later left MSPB and the third received a new Schedule C appointment. Ms. Johnson's Special Assistant's Schedule C appointment was terminated, and she was separated from MSPB effective January 18, 1991. Ms. Johnson's Executive Assistant received a temporary Schedule A appointment on December 30, 1990, and was separated from MSPB with the appointment's expiration on January 31, 1991. Ms. Johnson's Confidential Advisor received a new (temporary) Schedule C appointment as a member of Chairman Levinson's staff effective February 1, 1991.

MSPB's Personnel Director said in November 1990 that she believed it was permissible to detail these Schedule C appointees as MSPB had done because the Federal Personnel Manual permitted the details of Schedule C appointees, and such details are not prohibited by law or regulation. The Personnel Director said she had advised the Executive Director that the Schedule C appointees could be detailed. The Personnel Director also said she believed that the requirement of a close and confidential working relationship with the key official only had to be satisfied at the time a Schedule C appointment was made and did not have to continue thereafter without interruption.

As we interpret the duties and responsibilities outlined in the official MSPB position descriptions of these Schedule C appointees, the appointees were hired to work with then-Vice Chairman Johnson in a close and confidential working relationship. We believe, and the OPM official we spoke with agreed, that OPM's regulatory requirement of a close and confidential working relationship with the key official is a continuing requirement that must exist so long as these Schedule C appointees serve under their appointments.

⁷Schedule A appointees are individuals who receive noncompetitive appointments at the GS-15 level and below to positions other than those of a confidential or policy-determining character for which it is not practicable to apply the qualification standards and requirements established for the competitive service. See 5 C.F.R. 213.3101.

Once the requisite close and confidential relationship was severed upon the key official's departure from MSPB, the rationale for continuing the Schedule C appointees' employment under these appointments ceased to exist. MSPB then had to take immediate steps either to provide the appointees with new appointments or to terminate their employment. Thus, we disagree with the MSPB Personnel Director's view that the detailing of Ms. Johnson's Schedule C appointees after Ms. Johnson had left MSPB was proper because with Ms. Johnson's departure the appointees were no longer entitled to serve under their Schedule C appointments.

Excessive Pay Granted to Three SES Appointees

In addition to the improper Schedule C details, our review of personnel actions involving MSPB's Schedule C appointees showed that former Vice Chairman Johnson's Executive Assistant received a rate of pay higher than that authorized under MSPB's SES pay-setting policy. Subsequently, we identified another Schedule C appointee, Chairman Levinson's Counsel for Legislative Policy, and a career appointee, the former Director of MSPB's Office of Appeals Counsel,⁸ as also having received excessive pay in violation of this same policy.

Former Vice Chairman Johnson served as Acting MSPB Chairman from March 1986 to August 1986, when current Chairman Levinson arrived at the Board. Ms. Johnson said that at the time she became Acting Chairman, she initiated action to have her grade-level 15 Executive Assistant receive a temporary SES appointment. The Executive Assistant's personnel records show that she received an 18-month SES limited emergency appointment effective March 21, 1986.⁹

The Executive Assistant's personnel records also show that at the time of her 1986 SES appointment, her GM-15 annual salary was \$55,746. The Executive Assistant's SES appointment was initially made at level ES-2, with an annual salary of \$63,764. This pay level was later retroactively changed to ES-4, with an annual salary of \$68,700. We could not establish from the Executive Assistant or from a review of her personnel records why her SES pay level was first set at ES-2 and then retroactively changed to ES-4.¹⁰

⁸In May 1991, this executive was serving as Chief Counsel to the Vice Chairman.

⁹According to OPM, a limited emergency appointment can be made by an agency to meet a bona fide, unanticipated, urgent need. A limited emergency appointment is not a career appointment and cannot exceed 18 months.

¹⁰Ms. Johnson attributed this situation to a paperwork error in MSPB's personnel office.

The Executive Assistant's personnel records further document that she returned to her GM-15 position in the Vice Chairman's office with the termination of her SES appointment on August 17, 1986. Upon her return, the Executive Assistant's annual salary was set at \$67,940, based on the Executive Assistant's prior "maximum payable rate" figure.¹¹ Collectively, these personnel actions permanently increased the Executive Assistant's annual GM-15 salary by \$12,194, almost 22 percent, in the 5 months from March 1986 to August 1986.

Also, in appointing the Executive Assistant to level ES-4, the agency failed to follow MSPB Order 1465.6, Administrative Management-Senior Executive Service Pay-Setting Policy, dated August 6, 1985. This policy required that all initial appointments to the SES be made at level ES-1 unless MSPB's Executive Resources Board (ERB) expressly authorized a higher ES level in advance of the appointment.

We interviewed two MSPB officials who were ERB members in 1986 and who attended the February 1986 ERB meeting during which the Executive Assistant's SES appointment was mentioned. Both officials said they did not recall the ERB authorizing a pay rate higher than ES-1 for the Executive Assistant. The ERB's written minutes of this February 1986 meeting document that the Executive Assistant's SES appointment was mentioned during the meeting, but the minutes make no mention of the ERB authorizing a higher pay level for the Executive Assistant.

MSPB's Executive Director said she did not believe that MSPB had to follow the above policy in the Executive Assistant's situation. However, in such situations, we have previously held that an agency must follow its own administrative regulations, and that exceptions can be made only where expressly authorized in those regulations.¹² In the absence of prior authorization from MSPB's ERB to do otherwise, MSPB Order 1465.6 required the agency to set the Executive Assistant's pay level at ES-1.

In commenting on our finding, former Vice Chairman Johnson said her understanding (from MSPB's Executive Director) was that MSPB had not followed the pay-setting procedure in MSPB Order 1465.6 in making any

¹¹MSPB's Executive Director explained that under the "maximum payable rate" rule in 5 C.F.R. 531.203, the Executive Assistant received the pay rate most comparable to the rate she received while under the SES appointment without exceeding the maximum pay authorized for her grade 15 position.

¹²See 51 Comp. Gen. 30 (1971); B-212278, September 2, 1983; and 65 Comp. Gen. 439 (1986).

of MSPB's initial SES appointments.¹³ However, we could not conclusively determine whether this was the case. MSPB's personnel records show that MSPB made a total of five initial SES appointments during the period the pay-setting regulation at issue was in effect. Of these five appointments, two were made at ES-1 and three were made above the ES-1 level, as table 1 shows.

Table 1: Initial SES Appointments Made Under MSPB's 1985 Pay-Setting Regulation

SES position title	Appointment date	Appointment type	Previous pay at GM/GS-15	Level ES-1 pay rate	SES grade/pay received	ERB approval of pay level above ES-1?
Legislative Counsel	10/27/85	Career	\$56,306	\$61,296	ES-1/\$61,296	Appointment was processed at ES-1
Executive Assistant to the (Acting) Chairman	3/21/86	Limited emergency	55,746	61,296	ES-4/\$68,700	None documented
Director, Office of Appeals Counsel	12/21/86	Career	59,295	61,296	ES-2/\$63,764	None documented
Regional Director, San Francisco Regional Office	3/1/87	Career	64,569	64,700	ES-1/\$64,700	Appointment was processed at ES-1
Counsel to the Chairman for Legislative Policy	7/19/87	Noncareer	53,830	64,700	ES-2/\$67,600	None documented

Source: MSPB personnel records.

Minutes of the ERB's meetings during the period these five appointments were made show that the ERB discussed the qualifications of all three of the career SES appointees. The minutes also show that the limited emergency appointment of former Vice Chairman Johnson's Executive Assistant was briefly mentioned during an ERB meeting. However, the minutes do not show that the ERB ever considered the noncareer SES appointment of Chairman Levinson's Counsel for Legislative Policy. The minutes also do not indicate that the pay levels of any of these five executives were the subject of ERB deliberations. In any event, because the requirements of the pay-setting regulation were binding on all initial SES appointments made by MSPB, the three appointments MSPB made above level ES-1 without express ERB approval were made in violation of the pay-setting regulation.

We believe that MSPB needs to retroactively correct the personnel and pay records of the three employees identified above who improperly received initial SES appointments above ES-1 to show their service as having commenced at ES-1. Post-SES appointment pay actions then need to be corrected to reflect other pay changes resulting from the correction

¹³The Executive Director also expressed these views in a January 31, 1991, letter to us.

of the initial SES appointment error. MSPB also needs to determine the total amount of the salary overpayments resulting from the pay-setting errors and take collection action to recover the amount of the overpayment from the three employees.

However, if MSPB considers any of these situations appropriate for waiver consideration, it may postpone collection action and submit such cases to us for adjudication in accordance with the provisions of 4 C.F.R. ch. 1. Under this procedure, MSPB's Chairman can recommend to the Comptroller General of the United States that the Comptroller General waive an erroneous salary overpayment (exceeding \$500).

MSPB's IG's Reporting Line Impaired Organizational Independence

Until January 1991, MSPB's IG reported to the agency's Executive Director rather than directly to the MSPB Chairman. While we did not find evidence that this pre-January 1991 reporting line influenced the IG against investigating the specific T&A abuse allegations regarding the Board members and their staffs, this reporting arrangement violated the GAO standard and OMB requirement that the IG be organizationally independent.¹⁴

OMB Circular A-73, which incorporates GAO's governmentwide auditing standards,¹⁵ sets forth the policies to be followed by the audit organizations of all executive agencies, including MSPB. Circular A-73 requires that the audit organization be located outside the staff or program management structures of activities subject to audit. It also requires that the audit organization report to the head or deputy head of the agency.

The organization charts in MSPB's fiscal year 1988, 1989, and 1990 annual reports showed that the head of every major organizational component in MSPB outside of the Board members' immediate offices, including the IG, reported to the Executive Director. As such, the Executive Director was effectively responsible both for managing MSPB's program operations and for supervising the IG, who was the MSPB official charged with auditing these same program operations. After reviewing this arrangement, we concluded that this reporting line materially impaired the IG's organizational independence.

¹⁴The IG said he first became aware of these allegations in 1989 when two MSPB employees brought them to his attention. Following discussions with the Executive Director, the IG concluded that the allegations were such that a GAO investigation would be more credible than an internal agency investigation.

¹⁵Government Auditing Standards (GAO, July 1988).

When we brought this concern to Chairman Levinson's attention in January 1991, the Chairman agreed to change the reporting line to have the IG report directly to him. Mr. Levinson said this realignment would be beneficial to MSPB in that it would further strengthen management controls and add emphasis to sensitive programs. Our review of recent changes to MSPB's functional statements and delegations of authority showed that beginning January 15, 1991, MSPB's IG reported directly to the Chairman.

In discussing this issue with us, Chairman Levinson observed that MSPB's pre-January 15, 1991, IG reporting line had been reviewed by OMB in August 1987 and had been found to be in compliance with Circular A-73 audit standards. Our review of the June 1987 letter to OMB in which MSPB described its IG reporting line showed that MSPB told OMB its IG's office was located "outside the staff or program management structures of activities subject to audit." However, as discussed above, the IG reported to the same line official (the Executive Director) who managed the MSPB program operations that the IG was responsible for auditing. Therefore, contrary to MSPB's stated position in its June 1987 letter to OMB, MSPB's IG did not have adequate organizational independence.

Perceptions of a Discriminatory Work Environment

In the course of our interviews with past and present MSPB employees, a number of these persons volunteered their perceptions of a racially and/or sexually discriminatory working environment at MSPB. These perceptions were held by MSPB personnel at the Board member, SES, and GM-15 levels, as well as at lower organizational levels.

Of 31 current and former MSPB staff we interviewed, 9 specifically said they had been the victims of racial and/or sexual discrimination or perceived that such discrimination existed at MSPB. Of these nine interviewees, one was a former Board member, one was a former SES-level Managing Director, one was a former GM-15 Personnel Director, and one was a former GM-15 EEO Director.

Additionally, data provided by MSPB's EEO Director show that 10 other current and former MSPB employees, none of whom we interviewed, had filed a total of 18 formal discrimination complaints between January 1, 1987, and December 30, 1990. Of these 18 complaints, racial and/or sexual discrimination concerns accounted, in whole or part, for 13 of the complaints. Among the complainants were an SES-level former Director of Regional Operations, a GM-15 supervisory attorney, and a former

GM-15 employee who served both as MSPB's Personnel Director and EEO Director.

We also noted an instability in the leadership of MSPB's EEO and personnel offices, two program offices that play major roles in addressing EEO-related problems. MSPB's records show that in the 5 years from January 1, 1986, through December 31, 1990, the agency had five different EEO directors and five different personnel directors. These records also show that two of the five personnel directors were attorneys detailed from other MSPB offices with no previous experience managing or working in an operating personnel office. Of the remaining three personnel directors, two of these ultimately raised discrimination allegations of their own through the agency's EEO redress channels. The current EEO and Personnel Directors have been in their positions since February 1990 and November 1988, respectively.

We discussed these issues with Chairman Levinson in January 1991. The Chairman said that as a result of an agency management conference held in October 1990, MSPB had planned an internal management review that would, in part, seek MSPB employees' perceptions of the agency's work environment.

After meeting with us, Chairman Levinson took action to further emphasize the importance of EEO in MSPB. Effective January 15, 1991, the Chairman changed the reporting line of the EEO office to have the EEO Director report directly to him. Previously, the EEO Director reported to MSPB's Executive Director.

Conclusions

MSPB Board members are compensated on the basis of their status as officers and are not required by law or regulation to work a set number of hours or days per week. Accordingly, these members can legally maintain whatever work schedules and office hours they deem appropriate to do their work. All other MSPB employees are subject to MSPB's T&A requirements.

Evidence we obtained on T&A practices shows that breakdowns existed in the T&A internal controls in the offices of each of the three Board members and the Executive Director. In one case, we found some evidence of possible T&A abuse by an employee in a Board member's office. While this evidence was not conclusive, lax supervision and ineffective T&A internal controls in that office created an exceptionally high potential for T&A abuse.

MSPB's Chairman said he has taken steps to correct the internal control weaknesses we identified by instructing that staff in these four offices follow the established T&A procedures. MSPB nevertheless needs to report the T&A internal control weaknesses in its fiscal year 1991 FMFIA report and in succeeding FMFIA reports through the year in which the weaknesses are corrected. In addition, these four offices need to be included in future internal agency audits of MSPB's T&A practices to ensure that the corrective measures taken have been effective.

The MSPB Chairman's January 1991 decision to have the IG report directly to the Chairman corrected the organizational independence problem that existed when the IG reported to the Executive Director. This realignment also brings MSPB into compliance with the GAO standard and OMB requirement governing the organizational independence of agency audit functions.

MSPB did not comply with OPM's regulations governing Schedule C appointees when, in November 1990, it improperly detailed three of its Schedule C personnel within MSPB after the key official for whom the appointees had been working left the agency. MSPB also did not follow its own published policy on setting SES pay rates in 1986 and 1987 when it made three initial SES appointments above the level authorized under its policy. MSPB should ensure that it consistently follows both OPM's regulations governing Schedule C appointees and its own pay-setting policy governing SES appointments. MSPB should also take steps to correct the pay-setting errors and to either recover or request a waiver of the overpayments involved.

A number of past and present MSPB personnel, including several senior agency officials, voiced their perceptions of a racially and/or sexually discriminatory work environment at MSPB. We believe that MSPB's plan to assess its work environment as part of an upcoming internal management review is a good first step in determining the extent of any systemic EEO problems, whether real or perceived, that may exist. MSPB needs to take action thereafter to correct any problems it finds.

Recommendations

We recommend that the MSPB Chairman direct that the following actions be taken:

- Report as a material internal control weakness, together with proposed and/or completed corrective actions, the T&A problems discussed above

in MSPB's fiscal year 1991 annual FMFIA report to the president and Congress and in each succeeding year's annual FMFIA report through the year in which the weaknesses are corrected. Corrective actions should include examining the offices of the Board members and Executive Director in future internal audits of MSPB's T&A procedures and internal controls.

- Instruct MSPB's Personnel Director to ensure that Schedule C appointees employed in MSPB positions requiring a close and confidential working relationship with a key appointed official are not employed or detailed in circumstances where the requisite working relationship no longer exists.
- Retroactively correct the salary rates of the three MSPB employees whose initial SES appointments violated MSPB's published 1985 pay-setting policy to comply with the policy. MSPB should thereafter adjust these employees' post-appointment pay actions to reflect the corrected (initial SES appointment) salary rates and account for the overpayments received by the employees through recovery or waiver request actions as appropriate.
- Complete the planned MSPB internal management review to determine the extent and causes of employees' perceptions of a discriminatory work environment and follow up with any corrective actions needed.

Comments From MSPB Chairman Levinson, Former Vice Chairman Johnson, FLRA, and Our Evaluation

We obtained official comments from MSPB Chairman Levinson and former Vice Chairman Johnson on a draft of this report. We also provided former Member Bogley with an opportunity to review and comment on the draft report. Mr. Bogley did not, however, submit comments. In addition, we discussed our findings on the FLRA detailee's time and attendance with FLRA's Executive Director.

Chairman Levinson said MSPB had implemented our recommendation on strengthening MSPB's T&A internal controls and planned to implement all of our other recommendations. Mr. Levinson added, however, that he felt it might have been useful for us to have done some additional audit work before finalizing our conclusions on MSPB's working environment. As we said earlier in this report, and as we explain in our evaluation of Mr. Levinson's comments in appendix I, a review of MSPB's work environment was not within the scope of our planned review. We briefly addressed this issue in the report after successive MSPB interviewees volunteered their perceptions of a racially and/or sexually discriminatory working environment at MSPB, and we felt that top MSPB management needed to be apprised of this problem.

In her comments on the draft report, former Vice Chairman Johnson disagreed with our finding that a 1986 pay-setting error occurred in the appointment of Ms. Johnson's Executive Assistant to the SES. As explained in our evaluation of Ms. Johnson's comments, which appears in appendix II, we continue to believe that our conclusions on the pay-setting error are appropriate.

Additionally, we discussed the T&A internal controls problem involving the FLRA detailee to former Member Bogley's office with FLRA's Executive Director. This official said that while FLRA believes that the inter-agency agreement detailing the FLRA employee to MSPB met applicable FLRA and OPM requirements, FLRA will nevertheless ensure that it carefully monitors the T&A aspects of its interagency details.

The full texts of Chairman Levinson's and former Vice Chairman Johnson's comments on our findings and recommendations, along with our evaluation of these comments, are included in this report in appendixes I and II.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the date of this letter. At that time, we will send copies to the Chairman, House Post Office and Civil Service Committee; the Chairman, House Government Operations Committee; the Chairman, House Appropriations Committee; the Chairman, MSPB; the Chairman, FLRA; the Director, OMB; the Director, OPM; and others who may have an interest in receiving this report.

The major contributors to this report are listed in appendix III. Please contact me at (202) 275-5074 if you or your staff have any questions or need any additional information.



Bernard L. Ungar
Director, Federal Human Resource
Management Issues

Comments From the Merit Systems Protection Board

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

THE CHAIRMAN



U.S. MERIT SYSTEMS PROTECTION BOARD
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

May 24, 1991

Mr. Richard L. Fogel
Assistant Comptroller General
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

This is in response to the draft GAO report entitled: Merit Systems Protection Board: Time-and-Attendance and Personnel Practices Need Attention. As footnoted in the draft, GAO was asked to undertake a review of the primary issues addressed herein by the Board's own Inspector General in 1989 (see footnote 10). The Board appreciates the efforts put into this audit by GAO over the past 2 years.

During the course of the audit, it became apparent that GAO auditors and Board management differed in their respective views of certain internal Board policies, as well as in the permissible interpretation and application of external advice and guidance furnished by the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM). Because we view key recommendations of the draft as managerially beneficial, however, it is unnecessary and would be unproductive to press these disagreements further.

In particular, GAO's recommendations to reconfigure the IG reporting relationship and the certification procedure for Time-and-Attendance cards in the Offices of the Board strengthen the Board's internal controls and, as noted in the draft report, have already been implemented. (See draft at pp. 11, 16-17.) In accordance with GAO's recommendations, the Board will document the history of these changes in its FMFIA report for 1991.



The Bicentennial of the U.S. Constitution 1787-1987

See comment 1.

Now footnote 14.

See comment 2.

Now on pp. 12 and 19.

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With respect to the two Schedule C issues:

(1) The Board accedes to GAO's view regarding the defectiveness of the personnel actions that effectuated a 90-day detail of the three Schedule C employees of Vice Chairman Maria L. Johnson. The Board's Personnel Office will be instructed in accordance with GAO's recommendation; and

(2) The Board accedes to GAO's view that, notwithstanding agency head discretion to set ES pay levels, one of the former Acting Chairman's Schedule C employees was granted an enhanced ES pay level without documentary evidence that the Executive Resources Board so authorized the higher pay level. In accordance with GAO's recommendations, we will correct the pay-setting and initiate salary overpayment proceedings, taking into account the provisions of Subchapter G, Chapter 1, of Title 4, Code of Federal Regulations.

Finally, the Board welcomes GAO's recommendation to follow up on its internal management review that will explore, among other things, workplace environment issues. As noted in the draft, GAO identifies an area already of concern to Board management.

It is unfortunate that the GAO auditors did not have occasion to discuss the Board's EEO environment with its EEO Director, other than to obtain raw EEO complaint data. We understand that the EEO environment was not a primary purpose of the audit. Nonetheless, had our current EEO Director, who has held this office during the entire period the nearly 2-year audit was conducted, been asked to discuss the Board's numerous EEO programs and resulting feedback, it might well have altered the approach and tone of this portion of the draft.

In measuring workplace discrimination, it should be noted that raw EEO complaint data can be probative, can be misleading, or, depending on circumstances and analysis, can sometimes be a mix of both. For example, the Board itself has noted that an absence of EEO complaints does not necessarily signify a workplace free of discrimination, as potential complainants may be unaware of, or uncomfortable with an organization's EEO complaint procedures. See Sexual Harassment in the Federal Workplace: Is It A Problem? at p. 74 (MSPB 1981).

Our planned internal management review is designed to recognize the influence of culturally rooted feelings and beliefs on organizational dynamics; to communicate across cultural and ethnic boundaries; and to analyze typical

See comment 3.

See comment 4.

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reactions to allegations of discrimination and typical responses to feelings of oppression. We believe the program is off to a promising start in large part because of the Board's existing EEO posture.

In this regard, we point out that: (1) the Board already enjoys the benefits of a highly diverse and richly heterogeneous work force at both the professional and support level; and (2) Board employees have expressed EEO concerns, at the rate of two complainants per year, but they have done so in proportion to their representation in the work force.

Typically, GAO audits that reveal EEO problems do so for one or both of two reasons: (1) there exists a significant underrepresentation of one or more protected groups; and (2) there exists a pattern of EEO complaint activity concentrated within a particular gender, racial or ethnic category, thus raising a suspicion of systemic discrimination. Neither instance applies to the Board. To the extent that its diversity has been accompanied by tensions noted in the draft, therefore, the Board is well positioned to benefit from management initiatives that specifically address how the agency can most successfully meet the challenges that workplace diversity present. Indeed, we look forward to sharing the results of these efforts in the hope that as federal agencies continue to strive toward achieving diversity, they can benefit from the Board's experience.

Thank you for this opportunity to comment on the draft, and I ask that these comments be reprinted in unedited form as an appendix to your published report.

Sincerely,



Daniel R. Levinson

See comment 5.

GAO Comments

1. As we said on page 1 of the report, two congressional requesters asked that we look into certain allegations involving the T&A practices of the three MSPB Board members and their personal staffs. Subsequently, we broadened the scope of our review to examine a number of other mismanagement allegations and problems. These mismanagement allegations and problems were included in the review as the result of additional information provided by the requesters and findings we had made through early audit work at MSPB. MSPB's IG neither reviewed any of these issues nor played any part in planning or accomplishing our 15-month review. The IG's role, in fact, did not extend beyond providing us with general agency background information and some preliminary information about the absenteeism allegations.

2. We believe that our interpretations of the OMB, OPM, and MSPB regulations, policies, and procedures cited in the report are accurate and were appropriately applied to the situations discussed.

3. As Chairman Levinson notes, an evaluation of MSPB's EEO program was not a part of our planned review. However, in the course of our work on other issues, we received substantial information on MSPB's working environment. For example, in the context of a discussion on other issues, a former MSPB EEO Director offered his assessment of MSPB's working environment during his employment at the agency. As we noted on page 19 of our report, this former EEO Director was one of a number of interviewees who said they perceived a racially and/or sexually discriminatory working environment at MSPB. Additionally, the report notes that agency EEO complaint data showed that another former MSPB EEO Director (whom we did not interview) filed formal sexual discrimination complaints on his own behalf while working at MSPB.

We did speak with MSPB's current EEO Director about several issues relating to past and present EEO complaints in September 1990 and subsequently received written information and materials from her about MSPB's EEO programs and activities. We reviewed and considered the information and materials she provided (which addressed general EEO-related activities at MSPB beginning in mid-1990) in the course of our work. However, we were aware when we spoke with this official that she had worked as MSPB's EEO Director for only 7 months. Accordingly, we concluded that this official could not have had first-hand knowledge of the various pre-February 1990 EEO-related concerns voiced by the MSPB personnel we interviewed and, thus, did not explore these issues with her.

Additionally, beginning in January 1991, we shared our findings on MSPB's working environment with Chairman Levinson on three occasions—twice at meetings and once in writing—before completing and distributing our draft report for formal agency comments in May 1991. Thus, Mr. Levinson had an extended opportunity over several months to raise concerns he may have had about the procedures we followed or the factual conclusions we reached before the draft report was completed. During this period of time, Mr. Levinson's feedback concerning our work on this issue consisted of (1) a suggestion that we consider examining MSPB's workforce profile (depicting MSPB's workforce by such factors as race and gender) and (2) a request that we say in the report that MSPB's planned internal management review was an outcome of MSPB's October 1990 management conference.

We considered examining MSPB's workforce profile but decided not to do so because an evaluation of the composition of MSPB's workforce was not within the scope of our review. We did, however, specify the origin of MSPB's proposed internal management review in our draft report as Mr. Levinson had requested. All factors considered, we believe that MSPB had a very adequate opportunity to provide information and feedback to us on the working environment issue and have that information considered for inclusion in the report.

4. In discussing MSPB's working environment issue in our report, we outlined several different considerations as the basis for our overall conclusion that serious EEO-related problems may exist in MSPB. This conclusion was based on our collective findings that (1) numerous MSPB personnel said they perceived a discriminatory work environment at MSPB, (2) agency EEO complaint data showed that still other MSPB personnel had filed formal discrimination complaints alleging racial and/or sexual discrimination, and (3) the frequent turnover of MSPB's personnel and EEO directors raised concerns about instability in the leadership of these critically important program areas. Thus, raw EEO complaint data contributed to our overall conclusion on the working environment issue but were not given undue or inappropriate emphasis.

5. We did not address the specific racial or gender makeup of the MSPB personnel who voiced perceptions of a discriminatory work environment at MSPB or who filed formal discrimination complaints against MSPB officials. We agree with Chairman Levinson that these data show concerns and complaints coming from MSPB personnel who are members of different racial and gender groups. However, the fact that these concerns came from so broad a spectrum of different employees seemed to us to

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be evidence of serious internal problems. For this reason, we agreed that MSPB should evaluate its working environment during its planned management review.

Comments From the Former Vice Chairman of the Merit Systems Protection Board

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

May 16, 1991

Richard L. Fogel
Assistant Comptroller General
United States General
Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

Thank you for the opportunity to comment on the draft version of your proposed report entitled Merit Systems Protection Board: Time- and Attendance and Personnel Programs Need Attention. I have significant disagreement with the proposed finding that excessive pay was granted to my Executive Assistant during my tenure as Acting Chairman and her temporary SES appointment. I believe that the view that is expressed in the report on this issue is both legally and factually unsound. I strongly urge that you reconsider the position that is expressed in the draft report.

In any event, as I read the report the finding that my Executive Assistant was paid at an excessive rate is based wholly on the provision in MSPB Order No. 1465.6, para. 3(a), which provides in full that "[b]asic pay will be established at the current rate authorized for ES-1, unless the ERB authorizes an individual exception to a higher ES level prior to appointment." Apparently based on 51 Comp. Gen. 30 (1971), B-212278, September 2, 1983, and 65 Comp. Gen. 439 (1986), the authors of the draft report believe that the provision quoted above is mandatory and that the absence of express ERB approval for my Executive Assistant's ES-4 pay was therefore improper and that the differential between the ES-4 and ES-1 levels must be recovered. This is plainly not so.

In the first place, as explained in Executive Director Myers' January 31, 1991 letter to Mr. Kagan, it appears that the supposedly controlling provision in Order 1465.6, in fact, has never been followed by the Board! More specifically, Ms. Myers notes that "[t]wo senior Board officials, Evangeline Swift and Paul Mahoney, who served the ERB during 1986, have indicated that they were not aware of this policy and cannot recall any instance where the ERB made recommendations concerning initial pay levels." This

See comment 1.

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is not surprising, since, as Mr. Myers also points out, "Ann Ugelow, an OPM authority on SES personnel matters, has said it would be extremely unusual for an agency ERB to make recommendations concerning the initial pay level of a noncareer SES appointee."

See comment 2.

That MSPB has not in any cases similar to this one acted in conformance with the provision at issue here is legally quite significant. It is well-established that the government's consistent practice with respect to a rule or procedure can constitute acquiescence, such that it cannot without a repromulgation seek to jeopardize one's rights on the basis of an altered practice. And, then, of course, the change in practice can only operate prospectively. See, e.g., Saxbe v. Bustos, 419 U.S. 65 (1976); Massachusetts Mutual Life Insurance Co. v. United States, 288 U.S. 269 (1933).

See comment 3.

The point, of course, is that the Board has not in the past literally applied the provision cited in the draft report and it cannot start doing so now without a reaffirmation that the procedure is mandatory. And, again, if it were to do so, the application of the procedure could be prospective only. Nothing in the cited GAO precedent is to the contrary, since in each case the procedure relied upon was either one which in the past had been uniformly followed and/or was a procedure mandated by superior authority and not merely a discretionary undertaking by the agency involved.

See comment 4.

While I believe that the foregoing point is dispositive and demonstrates that the view expressed in the draft report cannot be sustained, there are additional and separate reasons why this is so.

It must be stressed that the provision relied upon by the authors of the draft report is not one that is imposed on the Board by any higher authority. It is neither a requirement of statute nor of Office of Personnel Management (OPM) regulation. While the MSPB is required to establish an ERB, it is not required to invest it with pay setting authority. 5 U.S.C. 3393. Rather, how the Board wishes to set the initial pay of its non-career SES appointees is a matter that is wholly discretionary.

See comment 5.

Significantly, within the Board, all administrative authority is vested in the Chairman. 5 U.S.C. 1205. This being so, the Chairman, whether permanent or acting, indisputably has the

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authority to determine what procedures will be followed in setting initial SES pay. Quite frankly, I was unaware of the provision in Order 1465.6 on which the draft report relies and no one brought it to my attention. What I was aware of, however, was the value of my Executive Assistant's services to me as Acting Chairman and on the basis of that I made an affirmative and conscious decision to set her pay at the ES-4 level. This decision was based on the fact that the two prior occupants of that position were both paid at the ES-4 level. My Executive Assistant's background and qualifications were, at the very least, equal to that of her two predecessors.¹ I certainly had the authority to do this under the power vested in me by statute (5 U.S. C. 1205). And, I certainly had the authority to alter the MSPB Order provision.

See comment 6.

Surely, though, the fact that I did not formally alter the provision about which I knew nothing, does not require that that provision override or take precedence over the conscious and affirmative decision I made to set my Executive Assistant's pay at the ES-4 level. To conclude that my action as Chairman was ineffective would not only constitute a mindless elevation of form over substance, but, more importantly, it would constitute a serious erosion of the authority that Congress through 5 U.S.C. 1205 gave to the Chairman as the administrative head of the Board.

See comment 7.

Finally, even if the points made above are ignored, and they clearly should not be, I am still confident that the government, whether through the Board, GAO, or any other entity, is precluded from attempting retroactively to reduce the employee's pay. I recognize that the government cannot be estopped from collecting monies owed to it, even when they have been erroneously paid, where the payment of the money in the first place was contrary to express law. The Supreme Court has affirmed this principle even where, as here, the affected person is blameless, and the result, therefore, is a harsh one. Office of Personnel Management v. Richmond, 110 S. Ct. 2465 (1990). But, in this case there is no legal prohibition. Neither Congress nor OPM prohibited in any way the setting of my Executive Assistant's pay at the ES-4 level. Her level of pay was within the discretion of the Board. Since the

See comment 8.

¹ While the initial paperwork erroneously set the rate at the ES-2 level, that was merely a clerical mistake made within the personnel office. I directed that the paperwork be corrected the same day to conform with my original intent to set the rate at the ES-4 level. This was not a retroactive action. OPM was notified that the pay rate was set at the ES-4 level.

See comment 9.

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of the Merit Systems Protection Board

Richard L. Fogel
May 16, 1991
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employee plainly relied to her detriment on the setting of her pay at the ES-4 level, and there is no legal prohibition against paying her at that level, the government is estopped from trying to change the situation after-the-fact. Molton, Allen and Williams, Inc. v. Harris, 613 F.2d 1176 (D.C. Cir. 1980).

See comment 10.

As I mentioned at the outset here, I greatly appreciate the opportunity to provide you with these comments. While I fully appreciate the need for GAO vigorously to review the kind of matters addressed in the draft report and to seek corrective action where appropriate, I am utterly convinced that, as currently written, the report seriously errs in the matter of my Executive Assistant's pay level. I believe that persisting in the views expressed in the report on this issue will not only result in a grave injustice to the affected employee, but also will constitute a serious erosion of the independence and authority that Congress has given to the Board generally, and to its Chairman in particular. I strongly urge reconsideration of the matter.

I would be happy to discuss this or related matters with you further, if you wish.

Sincerely,



Maria L. Johnson

MLJ/lcw

GAO Comments

1. As noted in our report, our review of the ERB's meeting minutes for the period during which the pay-setting errors documented in our report were made did not show that the pay levels of any of the five initial SES appointments made by MSPB while MSPB Order 1465.6 was in effect were the subject of ERB deliberations. However, we disagree with Ms. Johnson's representation that members of the ERB were unaware of this SES pay-setting policy at the time. The ERB's meeting minutes for this period show that the ERB discussed various aspects of the pay-setting policy on three successive occasions:

- At the ERB's October 8, 1986, meeting, the ERB discussed the mechanics of SES pay-level adjustments. These minutes also noted that ERB members were being provided with copies of existing Board policy, OPM guidelines, and Board practices concerning the setting of SES pay.
- At the ERB's May 7, 1987, meeting, MSPB's Executive Director led an ERB discussion on the SES pay-setting policy and the need for changes.
- At the ERB's October 21, 1987, meeting, there was extensive discussion by the ERB on proposed changes to the existing SES pay-setting policy. These minutes also documented a detailed presentation on the pay-setting policy and proposed changes to that policy by one of the two ERB members who, according to Ms. Johnson, subsequently said he had been unaware of the initial SES appointment pay-setting policy.¹

As published, MSPB's 1985 SES pay-setting policy in MSPB Order 1465.6 consisted of three pages. One of the pages is devoted almost entirely to statutory references and authorities. The remaining two pages contain the full text of MSPB's pay-setting procedures, including the policy for setting pay on initial appointments to the SES. Considering the brevity of this document, we do not believe that the ERB could have had three consecutive discussions on the policy without having had knowledge of the initial SES appointment pay-setting requirement.

2. Under the provisions of MSPB Order 1465.6, the agency expressly vested sole authority in its ERB to make initial SES appointments above pay level ES-1. Section 1 of MSPB Order 1465.6 explicitly makes the order's provisions applicable to all MSPB SES members. Accordingly, the requirements of that policy governed pay-setting for career as well as noncareer SES appointees at MSPB.

¹The minutes show that this same ERB member also attended the October 8, 1986, and May 7, 1987, ERB meetings at which the SES pay-setting policy was discussed.

3. We do not agree with Ms. Johnson that the legal principles involved in the court cases she cited have application to her Executive Assistant's situation. These cases involved the findings of courts that the government's longstanding administrative practices were relevant to the interpretation of statutory provisions. In the SES pay-setting situation addressed in our report, the controlling provision was an internal agency regulation rather than a statute, and the regulation's meaning and application were clear and unambiguous. The issue raised in our report was not that MSPB misinterpreted its SES pay-setting policy but that MSPB ignored it.

4. MSPB Order 1465.6 was the regulatory policy in force at the time Ms. Johnson's Executive Assistant received her initial SES appointment. This order required that all initial SES appointments be made at ES-1 except where MSPB's ERB exercised its express authority in the order to set pay above level ES-1. The three decisions of the Comptroller General we cited on page 16 of our report point out that MSPB was obligated to follow this administrative regulation. We do not agree with Ms. Johnson that MSPB's violation of its own regulatory pay-setting requirement on other occasions established a legal basis for also ignoring these requirements in her Executive Assistant's situation, particularly when it is noted that the Executive Assistant's appointment was the first of the three SES appointments in which the pay-setting error occurred.

5. Through its promulgation of MSPB Order 1465.6, MSPB established pay-setting requirements within the agency for all initial SES appointments. While the pay-setting provision at issue was not required by other applicable provisions of law or OPM regulation, it was consistent with those laws and OPM regulations. Clearly, an agency has authority to promulgate its own internal administrative policies and practices as long as these policies and practices are consistent with applicable statutory and regulatory requirements. Once the agency exercises this authority, the resulting policies and practices become binding on the agency's actions.

6. In our view, neither the qualifications of Ms. Johnson's Executive Assistant nor the grade levels of the Executive Assistant's predecessors are at issue here. The issue is whether the Executive Assistant's own initial SES appointment was made in accordance with the agency's pay-setting policy. In this regard, the evidence of record shows that the Executive Assistant's SES appointment did not comply with that policy.

We also believe that whether MSPB's Acting Chairman had authority to change the SES pay-setting policy is not the issue. Rather, the issue is

what agency policy was actually in effect when Ms. Johnson's Executive Assistant received her SES appointment. Agency records show that MSPB Order 1465.6 became effective on August 6, 1985, and remained as MSPB's SES pay-setting policy until superceded by MSPB Order 1465.7 on January 13, 1988. Ms. Johnson's Executive Assistant received her initial SES appointment on March 21, 1986. Therefore, the Executive Assistant's appointment was subject to—but did not comply with—the 1985 pay-setting policy, which reserved sole authority to set initial SES pay above level ES-1 to MSPB's ERB.

7. As we noted above, MSPB Order 1465.6 was the regulatory policy in force at the time Ms. Johnson's Executive Assistant received her initial SES appointment, and this order vested sole authority to make initial appointments above pay level ES-1 to MSPB's ERB.

8. We agree with Ms. Johnson that the principle of law in the court case she cites operates to prevent the use of estoppel against the government in cases where a payment authorized by statute is involved.² However, we disagree with Ms. Johnson's view that the government can be estopped from collecting the overpayment made to her Executive Assistant because the pay-setting policy in MSPB Order 1465.6 was not based on provisions of law or OPM regulation. Nothing in the court case Ms. Johnson cited authorizes estoppel against the government in a collection situation involving pay authorized in violation of an internal agency regulation such as MSPB Order 1465.6 that is consistent with law and OPM regulations.

9. We have added this information to our discussion of the Executive Assistant's SES appointment in a footnote on page 15 of the report.

10. We disagree with Ms. Johnson's view that the government is estopped from collecting the overpayment because MSPB's appointment of her Executive Assistant at ES-4 effectively waived the ES-1 pay-setting requirement in MSPB Order 1465.6. The court case Ms. Johnson cited does not support her position because the case involved certain actions to waive a regulatory requirement which were carried out by an agency official empowered to authorize such a waiver. In the Executive Assistant's situation, only the ERB was empowered to authorize an exception to the ES-1 pay-setting rule, and there is no evidence that the ERB ever did so.

²In some circumstances, estoppel may prevent the government from changing a benefits entitlement determination to a recipient's detriment if the recipient acted on the basis of information provided by the government in making an entitlement-related decision and that information proved to be wrong.

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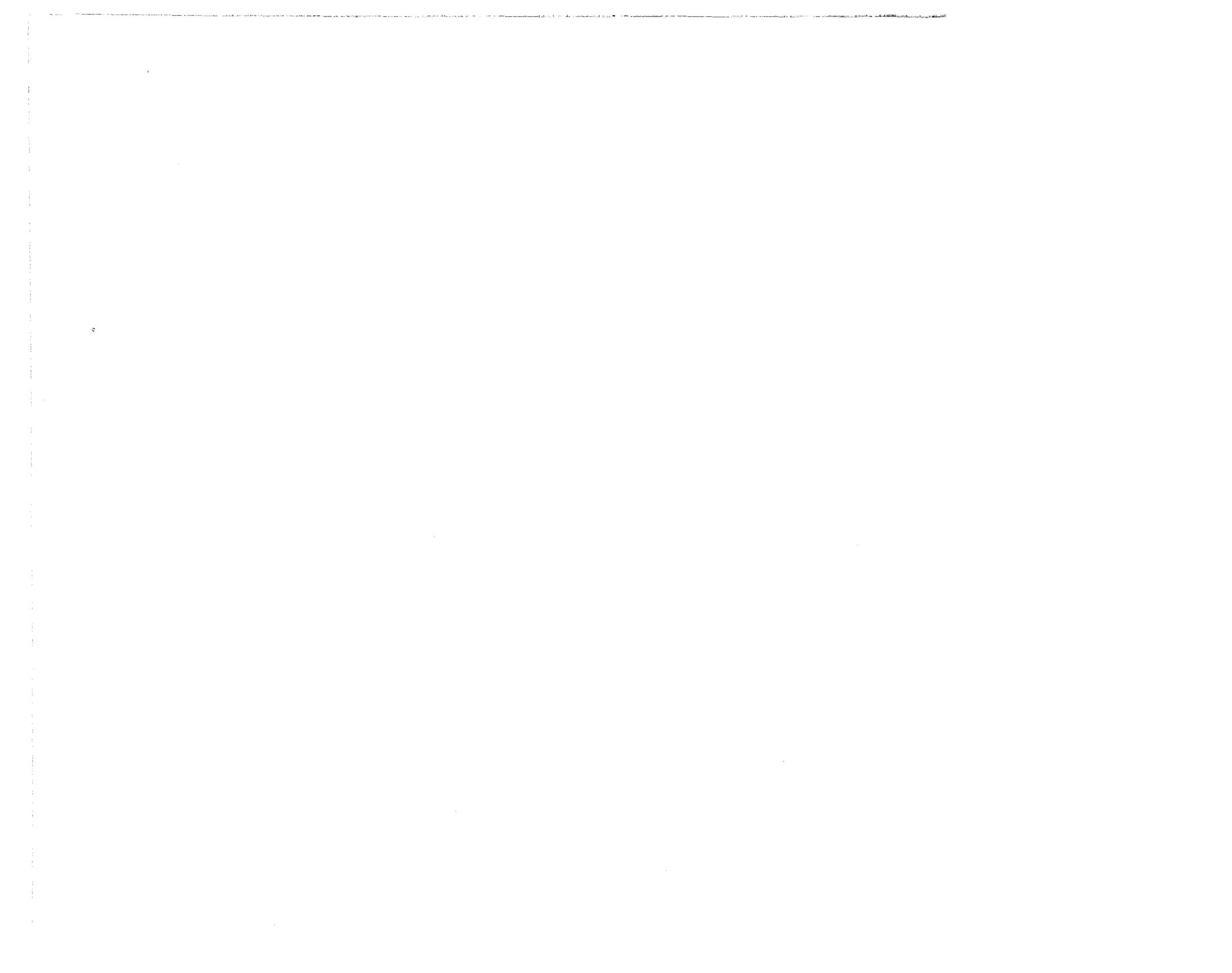
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